

COPY

MEMORANDUM

To: Judges

From: Brent Johnson, General Counsel

Re: Citations, Traffic Schools and the Authority of Judges

Date: December 11, 2000

The Judicial Council has asked that I send this memorandum to judges and other people involved in the criminal justice system. This memorandum results from communication to the Judicial Council which discussed a perceived lack of uniformity in the manner in which traffic citations are handled throughout the state, particularly when dealing with diversion programs such as traffic school. The purpose of this memorandum is to discuss available options in traffic cases.

When a citation is filed with a court, there are generally six options: 1) the defendant pleads guilty; 2) the defendant pleads not guilty and the case is set for trial; 3) the case is dismissed; 4) the case is resolved through a diversion agreement; 5) the case is resolved through a plea in abeyance agreement; or 6) the case is referred to a referee for appropriate disposition. I will briefly describe what occurs during each of these events.

1. **Guilty Plea.** This is perhaps the easiest of the six to handle, because a defendant need only appear at the court and plead guilty, or simply submit the appropriate fine if the citation is for a non-mandatory appearance. This process was not of concern in the communication that came to the Council.

2. **Not Guilty Plea with Trial.** This process also was not an issue in Judicial Council discussions. This process involves a defendant appearing at the court and entering a not guilty plea. The case is then set for either a jury trial or a bench trial. There is probably not much variance throughout the state concerning this practice.

3. **Dismissal.** Dismissals can occur for a myriad of reasons such as a failure to timely prosecute, lack of jurisdiction, statute of limitations problems, etc. Dismissal can often occur on the court's motion, or it can occur upon the motion of the prosecutor or the defense. The issue that has

been raised is whether conditions can be placed on the dismissal - e.g. a court agrees to dismiss a citation in exchange for a "processing fee," or in exchange for the defendant's attendance at a traffic school. The short answer is that a court cannot, absent a diversion or plea in abeyance agreement, impose conditions on a dismissal.

The Utah Constitution at Article I, Section 12 states that a defendant shall not "be compelled to advance money or fees to secure the rights herein guaranteed." A court cannot impose any fees as a condition of dismissal. It is impermissible for a court to charge a processing fee or other court costs as a condition of dismissing a case.

Similarly, a court cannot impose punishment, such as attendance at traffic school, as a condition of dismissal. It might be possible for the prosecution and defense to negotiate a dismissal based on a defendant's attendance at traffic school, but the court could not participate in the discussions and should only grant dismissal upon the appropriate motion. It would be best if any agreement for dismissal were executed as a diversion agreement.

4. **Diversion.** Utah Code Ann. § 77-2-5 allows a defendant to enter into a diversion agreement in order to have a case dismissed. Under a diversion agreement, a defendant agrees to perform certain conditions in exchange for charges ultimately being dismissed. For instance, a defendant could agree to attend a traffic school in exchange for a speeding charge being dropped. There are certain requirements for a diversion agreement. First, a diversion agreement must be in writing. Second, the prosecuting attorney must consent to the diversion and file the agreement with the court. Third, the court must approve the diversion agreement and cannot approve the agreement "unless the defendant, before a magistrate and in the agreement, knowingly and intelligently waives his constitutional right to a speedy trial." Section 77-2-5(6). Fourth, the Constitution still prohibits the court from charging any fees.

In order for a defendant to be able to attend traffic school as a part of a diversion agreement, the prosecuting attorney must agree in writing to the conditions, the defendant must appear in person to waive certain rights, the court must approve the agreement, and the court cannot collect any fees. It is permissible for a program, such as a traffic school, to collect fees directly from the defendant. It is not lawful under this program for a defendant to simply appear at the court and be promised dismissal for attending traffic school without following the above procedures.

5. **Plea in Abeyance.** Under Utah Code Ann. § 77-2a-2, a defendant may enter a plea in abeyance agreement which may ultimately result in the charges being dismissed. Under such an agreement, the defendant pleads guilty, but sentencing is delayed. The defendant agrees to certain conditions as a part of the guilty plea. If the defendant complies with the conditions, the plea is withdrawn and the case dismissed. The basic requirements for a plea in abeyance are as follows:

1. The agreement is initiated upon motion by both the prosecutor and the defendant.
2. The agreement need not be in writing (unless the offense(s) involve a felony) but the terms of the agreement must at least be fully recited in court.

3. In accepting the defendant's plea, the court must comply with Rule 11 of the Utah Rules of Criminal Procedure.

The plea in abeyance agreement is a useful tool for referring defendants to traffic school as long as the statute is followed. The statutes specifically provide that the court, because a guilty plea has been entered, may impose a fee and order restitution. Furthermore, although the plea is reported to the Drivers License Division, it does not result in the accumulation of points or otherwise result in a negative determination on the defendant's driving record unless the plea agreement is breached. If the agreement is violated, the agreement can be rescinded and the defendant sentenced under the original plea.

6. **Referral to Referee.** A court referee has the authority to "establish bail, order dismissals, refer persons to traffic school or otherwise equitably dispose of citations." Rule 3-202(7)(B), Utah Code of Judicial Administration. While this is a fairly broad grant of authority, the authority must be consistent with the Utah Supreme Court's decision in Salt Lake City, v. Ohms, 881 P.2d 844 (Utah 1994). Only judges may perform core judicial functions such as entering final orders and imposing sentences, and a defendant cannot waive or confer that authority through written agreement. A referee may essentially negotiate the amount of bail to which a defendant may plead guilty.